(7)

No. 09-1313

JUN 28 2010

IN THE

Supreme Court of the United States

HAIDAR MUHSIN SALEH,
ILHAM NASSIR IBRAHIM, *et al.*,

Petitioners,

v.

CACI INTERNATIONAL INC, CACI PREMIER TECHNOLOGY, INC., and TITAN CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS CACI INTERNATIONAL INC AND CACI PREMIER TECHNOLOGY, INC.

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent CACI Premier Technology, Inc. is a wholly-owned subsidiary of CACI, Inc. – Federal, which in turn is a wholly-owned subsidiary of Respondent CACI International Inc.

Respondent CACI International Inc is a publicly-traded company and is CACI Premier Technology, Inc.'s ultimate parent company. No publicly-traded company has a 10% or greater ownership interest in CACI International Inc.

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STATEMENT OF THE CASE

CACI adopts the statement of the case set forth in Respondent Titan's brief in opposition to Petitioners' petition. In particular, CACI notes that the Court of Appeals lacked jurisdiction to review, and did not review, the district court's grant of CACI's motion to dismiss Petitioners' Alien Tort Statute ("ATS") claims. CACI was before the Court of Appeals on an interlocutory appeal concerning preemption and Petitioners did not cross-appeal the district court's grant of CACI's motion to dismiss the ATS claims. *See* Pet. App. 8.

REASONS FOR DENYING THE PETITION

I. Petitioners' ATS Claims Do Not Present The Claimed Circuit Split and Do Not Warrant Review

A. Petitioners' ATS Claims Do Not Present The Claimed Circuit Split

1. The D.C. Circuit's Ruling Did Not Turn on Titan's Status As a Public or Private Actor

Petitioners first argue the Court should use this case to resolve a claimed circuit split as to whether the ATS permits claims for torture or war crimes to be brought against private actors. Pet. 14-19. The D.C. Circuit's decision, however, did not rest on that basis, and therefore does not squarely present that question. Instead, the D.C. Circuit rejected Petitioners' claims at the threshold, finding that Petitioners' "stunningly broad" claims could not be squared with the judicial

restraint this Court required in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). The D.C. Circuit's ruling did not depend on the Respondents' status as state or private actors. That ruling was a simple and straightforward application of the correctly-stated principles in *Sosa*, and does not implicate any circuit split.

In reviewing the facts and legal framework of *Sosa*, the D.C. Circuit observed that this Court had "noted, but declined to decide, the issue which divides us from the Second Circuit, whether a private actor, as opposed to a state, could be liable under the ATS." Pet. App. 31 (citing *Sosa*, 542 U.S. at 733 n.20). But the appellate court further observed that this Court's mention of the issue did not mean this Court had decided it: "courts often reserve an issue they don't have to decide because, even assuming *arguendo* they favor one side, that side loses on another ground." Pet. App. 31-32.

The same is true here—just as this Court did not decide the private actor issue in *Sosa*, the D.C. Circuit did not ground its decision on Titan's status as a private actor.[1] Instead, the appellate court rejected Petitioners' ATS claims because the breadth of those claims could not be squared with *Sosa*'s "imperative of judicial restraint." Pet. App. 32. The court noted *Sosa*'s command that federal courts considering new asserted tort actions under the ATS "must be reluctant to look

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1. The D.C. Circuit did not have jurisdiction to consider Petitioners' ATS claims against CACI, because Petitioners had not cross-appealed the ATS issue with respect to CACI. Pet. App. 8.

to the common law, including international law, in derogation of the acknowledged role of legislatures in making policy." *Id.*

"Bearing that caution in mind, and in light of the holding of *Sosa*," the D.C. Circuit had "little difficulty in affirming the district judge's dismissal of" Petitioners' ATS claims against Titan. *Id. Sosa* permits recognition of a new claim under the law of nations only where there is a firm international consensus as specific and universal as that which existed in 1789 for the three limited causes of action contemplated at the time: piracy, infringement of ambassadorial rights, and violations of safe conduct. Pet. App. 30-31. In contrast to this very narrow opening, the D.C. Circuit observed that

> [Petitioners'] claim—as it appeared in their briefs and oral argument before us—is stunningly broad. They claim that any 'abuse' inflicted or supported by Titan's translator employees on plaintiff detainees is condemned by a settled international law. At oral argument, counsel claimed that included even assault and battery.

Pet. App. 32-33 (footnote omitted). At oral argument, Petitioners' counsel confirmed Petitioners' claims were not limited to what is "labeled definitionally as torture," but included all "physical force" because Petitioners claimed "assault and battery." Pet. App. 33 n.12. The D.C. Circuit rejected Petitioners' claim as "an untenable, even absurd, articulation of a supposed consensus of international law." Pet. App. 33.

The D.C. Circuit then went on to discuss a number of alternative reasons supporting its decision. One alternative reason (stated after an express "*arguendo*" assumption) was the D.C. Circuit's rule that "[a]lthough torture committed by a state is recognized as a violation of a settled international norm, that cannot be said of private actors." Pet. App. 34; *see* Subsection 2, *infra*.[2] The court further noted that Petitioners' allegation that Respondents acted "under the color of law" ran into the problems of federal preemption and sovereign immunity. Pet. App. 34-35 (citing Pet. App. 123-24 & n.3; *see also* Pet. App. 109-11). Importantly, this case and the D.C. Circuit precedent on which the appellate court relied concern allegations of conduct under color of *United States* law, and therefore raise sovereign immunity and preemption issues that are not present in the Second and Eleventh Circuit cases on which Petitioners rely, which all concerned conduct under color of *foreign* law. Based on this significant *factual* difference, there is not any conflict of law between the D.C. and Second Circuits on this point. *See Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207 n.4 (D.C. Cir. 1985).

The Court of Appeals continued to discuss additional reasons for its ruling, including:

- this Court's "recognition of Congress' superior legitimacy in creating causes of action," Pet. App. 35 (citing *Sosa*, 542 U.S. at 725-28);

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2. The court did not address the Second Circuit's exception to this rule where torture is alleged within a claim for genocide or war crimes, finding Petitioners had "not brought to our attention any specific allegations of such behavior." Pet. App. 34 n.13.

- the absence of any legislatively-created cause of action in the Torture Victim Protection Act, the Military Commissions Act, the federal torture statute, the War Crimes Act, or the Uniform Code of Military Justice, *id.*;

- this Court's command of judicial restraint "where, as here, a court's reliance on supposed international law would impinge on the foreign policy prerogatives of our legislative and executive branches," Pet. App. 36; and

- a reference to the Court of Appeals' federal preemption analysis, based on congressionally stated policy in the Federal Tort Claims Act, Pet. App. 37 (*see also* Sec. II.C, *infra*).

None of these reasons concern the official or private actor status of the defendant. Thus, the D.C. Circuit's decision does not implicate the circuit split claimed by Petitioners.

2. The Circuit Split Claimed by Petitioners Is Neither Clear Nor Entrenched

Moreover, any circuit split regarding the availability of an ATS claim for torture against private actors is not as clear as Petitioners claim, and is certainly not entrenched. Petitioners do not mention a unanimous consensus, even among the circuits on which they rely, that the law of nations recognizes a universal bar only on *official* torture—*i.e.*, torture by government actors, not private actors. *See Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995) ("[T]orture and summary executions—

when not perpetrated in the course of genocide or war crimes—are proscribed by international law only when committed by state officials or under color of law."); *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980) ("[D]eliberate torture perpetrated *under color of official authority* violates universally accepted norms . . . .") (emphasis added); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1265 (11th Cir. 2009) ("State-sponsored torture, unlike torture by private actors, likely violates international law and is therefore actionable under the [ATS]."") (quoting *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1247 (11th Cir. 2005)); Pet. App. 34 ("Although torture committed by a state is recognized as a violation of settled international norm, that cannot be said of private actors.") (citing *Sanchez-Espinoza*, 770 F.2d at 206-07); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 795 (D.C. Cir. 1984) (Edwards, J., concurring).[3]

The exception to this state-action requirement that has been recognized in the Second and Eleventh Circuits

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3. The above decisions have relied on the international conventions and congressional statutes defining torture. *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment art. 1, para. 1, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85 (limiting definition of torture to acts by "a public official or other person acting in an official capacity"); Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452, 30 U.N. GAOR Supp. (No. 34) at 91-92, U.N. Doc. A/10034 (Dec. 9, 1975) (requiring that the actor be "a public official"); Torture Victim Protection Act, § 2(a), 28 U.S.C. § 1350 note (2006) (establishing right of action only against individuals acting "under actual or apparent authority, or color of law, of any foreign nation").

extends *only* to torture committed in the course of genocide or war crimes. *Kadic*, 70 F.3d at 244; *Sinaltrainal*, 578 F.3d at 1266-67. This case involves no allegations of genocide. The Court of Appeals, focusing on Petitioners' claims as Petitioners presented them in the Court of Appeals, ruled that Petitioners had not raised sufficient allegations of war crimes to remove their torture allegations from the general requirement of state action. Pet. App. 33-34 & nn.12 & 13. Similarly, the D.C. Circuit precedents on which the Court of Appeals relied involved claims of torture, but not genocide or war crimes. *Sanchez-Espinoza*, 770 F.2d at 205-07; *Tel-Oren*, 726 F.2d at 791, 795. Thus, this case does not present any circuit conflict regarding the genocide or war crimes question ruled upon in *Kadic*.[4]

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4. Indeed, the D.C. Circuit distinguished *Kadic* rather than departed from it. First, the court noted that despite its apparently broad language, *Kadic's* facts, and therefore its holding, concerned a quasi-state actor, "the self-proclaimed President of the Serbian Republic of Bosnia-Herzegovina" or "Srpska." Pet. App. 32. The court noted that "[w]hile Srpska was not yet internationally recognized as a state—thus technically rendering its militia a private entity—a quasi-state entity such as Radovan Karadzic's militia is easily distinguishable from a private actor such as Titan" (or CACI). *Id.* Second, the court specifically noted that even if "'war crimes' have a broader reach" than torture, Petitioners "have not brought to our attention any specific allegations of such behavior," and that the district court, considering Petitioners' ATS argument, "analyzed only an asserted international law norm against torture, not war crimes." Pet. App. 34 n.13; *see* Pet. App. 121-24 (*Ibrahim*), *adopted in* Pet. App. 109-11 (*Saleh*).

B. This Case Is a Poor Vehicle For Deciding the First Question Presented

This case is also a poor vehicle for deciding the first question presented, because there are substantial barriers to reaching that question.

Petitioners challenge conduct of the U.S. military, and allege that Respondents conspired with the U.S. military. This raises a host of issues that will interfere with this Court's ability to reach the question Petitioners present—whether the ATS can give rise to a torture claim against purely private actors. For instance:

1. CACI here raises two preemption defenses. *First*, the Constitution's commitment of the nation's war power to the political branches proscribes judicial review of common-law tort claims based on the conduct of military interrogations (either by military personnel acting in alleged conspiracy with CACI, or by CACI personnel acting under government or military policy). Pet. App. 23, 25; *see* note 21, *infra*, & accompanying text; *see also* Oral Arg. Tr. at 18-22, *Saleh v. CACI Int'l Inc*, Nos. 08-7001, 08-7030, 08-7044, 08-7045 (D.C. Cir. Feb. 9, 2010); Oral Arg. Tr. at 20-21, 74-76, *Saleh v. Titan Corp.*, Nos. 08-7008, 08-7009 (D.C. Cir. Feb. 9, 2010). *Second*, the FTCA's combatant activities exception embodies a congressionally-stated policy and a unique federal interest that the nation's battle activities be conducted free from judicial or common-law oversight.

See Pet. App. 37; *see also* Sec. II.C, *infra* (discussing Pet. App. 9-29).[5]

2. Because Petitioners allege conspiracy with military personnel, defenses such as sovereign immunity or absolute official immunity may also come into play. *See* Pet. App. 10 (noting sovereign immunity defenses reserved). Indeed, such defenses are likely the reasons Petitioners have not sued the United States or any military personnel directly. Respondents may be entitled, however, to dismissal based on the political question doctrine, or immunity based on doctrines such as derivative absolute official immunity or derivative sovereign immunity. *See Westfall v. Erwin*, 484 U.S. 292, 295-97 & n.3 (1988); *Mangold v. Analytic Servs.*, 77 F.3d 1442, 1446-50 (4th Cir. 1996); *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 72-73 (2d Cir. 1998); *Slotten v. Hoffman*, 999 F.2d 333, 336-37 (8th Cir. 1993).

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5. The *amici curiae* law professors argue that the federal preemption defense recognized by the D.C. Circuit cannot preempt an ATS claim, because both are matters of federal common law, such that one is not *lex superior* over the other. Brief of *Amici Curiae* Professors of Federal Courts, International Law, and U.S. Foreign Relations Law at 10-15. But the law professors focus only on the D.C. Circuit's extension of a federal preemption defense under *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988) (based on a congressional policy stated in the Federal Tort Claims Act). The law professors overlook that the Constitution itself, by assigning War powers exclusively to the political branches (*see* note 21, *infra*), occupies the field and precludes judicial review of our nation's conduct of war through common-law rights of action. *See* Pet. App. 23, 25. The enumeration of congressional and executive power in Article I and Article II is certainly *lex superior* to federal courts' exercise of common law power to divine new rights of action for violations of the law of nations under a federal statute, the ATS.

None of these concerns were present in the Second and Eleventh Circuit decisions on which Petitioners rely. All of those cases concerned allegations against private parties alleged to have acted in concert with *foreign* officials, *see Sinaltrainal*, 578 F.3d at 1257; *Romero v. Drummond Co.*, 552 F.3d 1303, 1308-09 (11th Cir. 2008); *Presbyterian Church v. Talisman Energy, Inc.*, 582 F.3d 244, 247 (2d Cir. 2009); *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 168-70 (2d Cir. 2009); *Khulumani v. Barclay Nat'l Bank*, 504 F.3d 254, 258-59 (2d Cir. 2007), *aff'd mem.*, 553 U.S. 1028 (2008), or in one case allegations against a foreign quasi-state official, *Kadic*, 70 F.3d at 236. Thus, those cases did not raise any possibility of separation of powers or federal preemption defenses.

In *Carmichael v. Kellogg, Brown & Root*, No. 09-683, the Solicitor General advised against certiorari review, in part because the presence of preemption or related defenses created potential obstacles to reaching the question presented for review (there, the applicability of the political question doctrine). Similarly here, the presence of the political question doctrine and significant preemption and immunity defenses stand as obstacles to the Court's reaching the ATS question.

C. The Court of Appeals' Rejection of Petitioners' ATS Claims Was Correct

Finally, the Court of Appeals' rejection of Petitioners' ATS claim under *Sosa* was correct.

As explained above, the D.C. Circuit had "little trouble" rejecting Petitioners' "stunningly broad" ATS claim, Pet. App. 32-33, where Petitioners expressly

disavowed any limitation to "torture" as defined by treaty or statute, but instead included all forms of physical force (such as "assault and battery"), Pet. App. 33 & n.12. The D.C. Circuit rightly termed Petitioners' claims "an untenable, even absurd, articulation of a supposed consensus of international law." Pet. App. 33.

Apart from the breadth of Petitioners' claims, the D.C. Circuit was correct to focus on the judicial restraint commanded by *Sosa*. In *Sosa*, this Court noted five reasons counseling great caution in recognizing new common-law rights of action under the law of nations: *first*, the modern understanding that the law is made, not discovered; *second*, a significant rethinking of the role of federal courts in making the law; *third*, the modern view that creation of private rights of action is better left to legislative judgment; *fourth*, considerations of adverse foreign policy consequences; and *fifth*, the lack of a congressional mandate to seek out and define new violations of the law of nations. *See Sosa*, 542 U.S. at 725-28; *Presbyterian Church*, 582 F.3d at 255 (summarizing *Sosa*); Pet. App. 121-22 (same).

All five *Sosa* factors, and especially the third and fifth, suggest the most important factor in recognizing a new cause of action under the law of nations is whether Congress has indicated the right of action should exist. *See Sosa*, 542 U.S. at 726-28; *see also, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001), *cited with approval in Sosa*, 542 U.S. at 727. This makes eminent sense, given that the Constitution assigns to Congress the "Power . . . To define and punish . . . Offences against the Law of Nations." U.S. Const. art. I, § 8, cl. 10.

With regard to Petitioners' claims,

> it is not as though Congress has been silent on the question of torture or war crimes. Congress has frequently legislated on this subject in such statutes as the [Torture Victim Protection Act, 28 U.S.C. § 1350 note], the Military Commissions Act, 10 U.S.C. § 948a *et seq.*, the federal torture statute, 18 U.S.C. §§ 2340-2340A, the War Crimes Act, 18 U.S.C. § 2441, and the Uniform Code of Military Justice, 10 U.S.C. § 801 *et seq.* . . .

Pet. App. 35. Despite this panoply of legislation, "Congress has never created this cause of action." *Id.*

Most significantly, in the TVPA, Congress *has* created a private right of action for torture, but has done so *only for torture under color of foreign law.* TVPA § 2(a), 28 U.S.C. § 1350 note; *see also* Pet. App. 36. Congress, which is charged with implementing the United States' obligations under international treaties including the Convention Against Torture, has decided that alleged torture under color of U.S. law should be remedied through criminal penalties, not a private right of action.[6] Where Congress has created certain

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6. Notably, in *Arar v. Ashcroft*, No. 09-923, the Acting Solicitor General argued "it is significant that when Congress created a damages remedy in the TVPA, it did not extend that remedy to the conduct of United States officials acting under color of United States law," and that this omission argued against implying such a remedy. Brief for John D. Ashcroft [*et al.*] in Opposition at 24, *Arar v. Ashcroft*, No. 09-923 (filed May 12, 2010) ("Ashcroft Br.").

remedies, the courts should be wary of creating others through implication from the common law. *See Sandoval*, 532 U.S. at 290 ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.").[7] Again, federal courts should be especially hesitant where recognition of a new common-law right of action would intrude on the foreign policy prerogatives of the political branches. *Sosa*, 542 U.S. at 727-28 (citing *Tel-Oren*, 726 F.2d at 813 (Bork, J., concurring)); *see also* Ashcroft Br., *supra* note 8, at 12-15.

With Congress having exercised its judgment and prerogative, the federal courts, under *Sosa*, should not create an additional private right of action through common law implication from the law of nations.

II. The Court of Appeals' Preemption Decision Does Not Warrant Review

The Court of Appeals' preemption decision concerns a single issue: whether a *state* can regulate the conduct of war by providing a tort remedy against contractors for the conduct of employees performing combatant activities while integrated into United States military units. The Court of Appeals determined that two aspects of federal law preempted such state-law tort actions:

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7. The *Arar* federal defendants similarly argued that where Congress has created statutory remedies, federal courts should not imply a private right of action (there, a *Bivens* action) on top of what Congress has provided. *See* Ashcroft Br., *supra* note 6, at 12, 19-23.

(1) the Constitution's allocation of foreign policy and war powers exclusively to the federal government; and (2) the federal interests embodied in the combatant activities exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(j) (2006). Pet. App. 9.

Despite Petitioners' suggestions to the contrary, Pet. 32-37, the Court of Appeals' preemption decision does not confer *immunity* on contractors. Pet. App. 10. Nor does it preclude application of federal criminal laws,[8] the creation by Congress of a federal remedy for combat-related injuries, or establishment of an administrative compensation scheme by the Executive. Indeed, as the Court of Appeals observed, "[t]he U.S. Army Claims Service has confirmed that it will compensate detainees who establish legitimate claims for relief under the Foreign Claims Act, 10 U.S.C. § 2734."[9] Thus, the Court of Appeals' preemption decision did not impede the *federal* regulation of contractors and their employees performing combatant activities alongside military personnel, but concerned only whether the *states* have a permissible role in regulating perhaps the most peculiarly federal governmental function, the prosecution of war.

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8. Pet. App. 3 ("While the federal government has jurisdiction to pursue criminal charges against the contractors should it deem such action appropriate . . . .").

9. Pet. App. 4. As the Court of Appeals noted, one of the plaintiffs did in fact file an administrative claim alleging detainee abuse. He was offered $5,000 as compensation for his detention even though the U.S. Army's investigation determined that, contrary to the claimant's allegations, he was never interrogated or abused while detained at Abu Ghraib prison. *Id.*

The Court of Appeals' preemption decision does not warrant review by this Court because the decision does not involve a circuit split, is consistent with this Court's preemption jurisprudence, and does not implicate the immunity issue identified in Petitioners' proposed question presented.

A. The Court of Appeals' Decision Does Not Implicate Derivative Sovereign Immunity as the Second Question Presented Suggests

Petitioners' second question presented asks the Court to review whether the Court of Appeals properly "extend[ed] derivative sovereign immunity to contractors." This is an incorrect characterization of the Court of Appeals' decision. The Court of Appeals expressly noted that, while CACI and Titan had asserted immunity defenses in the district court, those defenses had been reserved and were not before the Court of Appeals. Pet. App. 10. Indeed, the Court of Appeals proceeded just as this Court had in *Boyle*, 487 U.S. at 505 n.1, deciding the case on preemption grounds without resolving whether CACI and Titan also were entitled to immunity from suit. Pet. App. 9-10.

As a result, to the extent Petitioners' second question presented concerns the propriety of "extend[ing] derivative sovereign immunity to contractors," Pet. at i, this case does not present such a question and would be an inappropriate vehicle for deciding immunity-related issues.

B. The Court of Appeals' Preemption Decision Does Not Involve Any Claimed Circuit Split

Petitioners do not assert that the Court of Appeals' preemption decision creates a circuit split, nor could they.

State-law tort suits in which plaintiffs seek monetary compensation from contractors for combat-related injuries are a relatively new phenomenon. A few Court of Appeals decisions have considered the extent to which the political question doctrine bars state-law tort claims against contractors for combat-related injuries.[10] *Saleh*, however, is the first, and thus far only, Court of Appeals decision to determine the appropriate analytical framework for determining when state-law tort claims against contractors providing services in a combat zone are preempted by federal law.[11] In addition to *Saleh*, there are a few other pending tort suits against contractors for combat-related injuries, but none of

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10. *See, e.g.*, *Carmichael v. Kellogg, Brown & Root Serv., Inc.*, 572 F.3d 1271, 1281-83 (11th Cir. 2009), *cert. denied* (U.S. June 28, 2010); *Lane v. Halliburton*, 529 F.3d 548, 567 (5th Cir. 2008); *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1358-64 (11th Cir. 2007).

11. In *Koohi v. United States*, 976 F.2d 1328, 1337 (9th Cir. 1992), the court preempted tort claims against a procurement contractor based on its conclusion that the claimants' injuries occurred as a result of combatant activities. This decision is consistent with the D.C. Circuit's holding in *Saleh* that tort claims against a contractor are preempted where, during wartime, "a private service contractor is integrated into combatant activities over which the military retains command authority." Pet. App. 19.

these other cases has yet been the subject of a Court of Appeals decision.[12]

Because *Saleh* is the first Court of Appeals decision to consider the analytical framework for preemption of combat-related tort claims against contractors providing services in a combat zone, there is no circuit conflict that requires resolution by this Court. As a result, this Court's consideration of any preemption issues arising out of combat-related tort suits against contractors would benefit from further development of this area of the law by the Courts of Appeals. Indeed, as the United States recently opined in recommending denial of certiorari in *Carmichael*, "[i]n the end, consideration of the applicability of various defenses in suits against contractors supporting military operations in war zones would benefit greatly from further percolation."[13] This

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12. *See, e.g.*, *Harris v. Kellogg, Brown & Root Servs., Inc.*, 618 F. Supp. 2d 400, 432-33 (W.D. Pa. 2009), *appeal docketed*, No. 09-2325 (3d Cir. May 5, 2009); *Al Shimari v. CACI Premier Tech., Inc.*, 657 F. Supp. 2d 700, 724 (E.D. Va. 2009), *appeal docketed*, No. 09-1335 (4th Cir. Mar. 26, 2009); *Taylor v. Kellogg, Brown & Root Servs., Inc.*, No. 2:09-cv-341, 2010 WL 1707530, at *9 (E.D. Va. Apr. 16, 2010), *appeal docketed*, No. 10-1543 (4th Cir. May 14, 2010); *Fisher v. Halliburton*, No. H-05-1731, slip op. at 1-2 (S.D. Tex. Jan. 26, 2010), *appeal docketed*, No. 10-20202 (5th Cir. Mar. 31, 2010); *see also Al-Quraishi v. Nakhla*, No. 8:08-cv-1696 (D. Md. filed June 30, 2008).

13. Br. of United States as Amicus Curiae at 22, *Carmichael v. Kellogg, Brown & Root Serv., Inc.*, No. 09-683 (U.S. filed May 28, 2010) ("Often the law develops in a more satisfactory fashion if this Court withholds review of novel issues until differing views have been expressed by other federal courts." (footnote omitted) (citing and quoting *Vasquez v. United States*, 454 U.S. 975, 976 (Stevens, J., respecting the denial of certiorari))).

is particularly true with respect to the defense of federal preemption, as *Saleh* is the only Court of Appeals decision on this subject.

C. There Is No Conflict With This Court's Decisions in *Boyle* or *Wyeth*

Unable to claim a circuit split arising out of the Court of Appeals' preemption decision, Petitioners base their petition on a request for error correction, claiming that the Court of Appeals' decision conflicts with this Court's decisions in *Boyle*, 487 U.S. at 507, and *Wyeth v. Levine*, 129 S. Ct. 1187, 1206 (2009). Both of these assertions are incorrect. Neither the Court of Appeals' holding of combatant activities preemption under *Boyle* nor its finding of constitutional preemption pursuant to the constitutional allocation of war powers to the federal government is the slightest bit inconsistent with this Court's analysis in *Boyle* and *Wyeth*.

1. The D.C. Circuit's Conflict Preemption Analysis is Consistent with *Boyle*

In *Boyle*, 487 U.S. at 500, the Court announced the framework under which FTCA exceptions preempt tort claims against government contractors. The first requirement is that the dispute involve "'uniquely federal interests' [that] are . . . committed by the Constitution and laws of the United States to federal control." *Id.* at 504 (citations omitted). Once a unique federal interest is shown, preemption is appropriate where "a 'significant conflict' exists between an identifiable 'federal policy or interest and the [operation] of state law,' or the application of state law would

'frustrate specific objectives' of federal legislation." *Id.* at 507 (alteration in original) (internal citations omitted). Based on these conflict preemption principles, the Court in *Boyle* fashioned a specific test for deciding the case before it—namely, a test for identifying when allowing state-law product liability claims against government contractors would significantly conflict with the federal interests embodied in the discretionary function exception. *Id.* at 509-12.

The D.C. Circuit followed this precise framework in deciding *Saleh*. The court began with the text of the combatant activities exception—which retains sovereign immunity for "[a]ny claim arising out of the combatant activities of the military or naval forces . . . during time of war."[14] After surveying case law addressing this exception, the court determined that the federal policy embodied by the exception is "simply the elimination of tort from the battlefield, both to preempt state or foreign regulation of federal wartime conduct and to free military commanders from the doubts and uncertainty inherent in potential subjection to civil suit."[15] The D.C. Circuit then determined that state tort claims against contractors significantly conflicted with this important federal interest when, during wartime, "a private service contractor is integrated into combatant activities over which the military retains command authority." Pet. App. 19.

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14. 28 U.S.C. § 2680(J) (2006).

15. Pet. App. 14-15 (citing and discussing *Koohi*, 976 F.2d at 1334-35, *Johnson v. United States*, 170 F.2d 767, 769 (9th Cir. 1948), *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 18 (D.D.C. 2005), and *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486, 1493 (C.D. Cal 1993)).

The Court of Appeals' analysis not only poses no conflict with this Court's preemption analysis in *Boyle*, but explicitly applies this Court's analysis in *Boyle*. The Court of Appeals correctly stated the general rule for preemption under *Boyle*—preemption is appropriate where a federal statute embodied "uniquely federal interests" and the application of state tort law would significantly conflict with such uniquely federal interests. Pet. App. 11. The Court of Appeals then applied this rule to specific federal interests embodied in the combatant activities exception, a statutory provision not at issue in *Boyle*.[16] Thus, Petitioners' true contention is that *Saleh* involved a "misapplication of a properly stated rule of law," S. Ct. R. 10, a contention that is incorrect here, but even where correct is rarely an appropriate basis for review by this Court.[17]

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16. Petitioners argue that Defense Department rulemaking comments from 2008 evince the military's policy choice to rely on state tort law to regulate the conduct of contractors supporting military forces in war zones. Pet. 37. The Court of Appeals correctly rejected this premise, Pet. App. 20-21. Moreover, the United States has expressly repudiated Petitioners' interpretation of the rulemaking commentary, making clear that the Defense Department was neither stating policy nor opining on the state of the law. Brief for United States as Amicus Curiae at 12 n.4, *Carmichael v. Kellogg, Brown & Root Serv., Inc.*, No. 09-683 (U.S., filed May 28, 2010).

17. Petitioners also contend that the D.C. Circuit's decision here conflicts with this Court's preemption jurisprudence because the exceptions to the FTCA do not apply to contractors. Pet. 29. In that regard, Petitioners' quarrel is with *Boyle* itself, as this Court expressly held in *Boyle* that FTCA exceptions, though not bestowing contractors with sovereign immunity, can supply the unique federal interest that supports preemption of state tort claims against contractors. *Boyle*, 487 U.S. at 509. The D.C. Circuit made this point in rejecting this same argument. Pet. App. 12.

2. The D.C. Circuit's Decision in *Saleh* Does Not Conflict With *Wyeth*

Petitioners also err in contending that the D.C. Circuit's decision in *Saleh* conflicts with this Court's decision in *Wyeth*.

Wyeth's holding—that federal drug laws do not preempt state tort law regarding a manufacturer's duty to warn of risks—rested on "two cornerstones" of preemption jurisprudence: *first*, the "touchstone" of congressional purpose, and *second*, a presumption against preemption in areas traditionally subject to state regulation. *Wyeth*, 129 S. Ct. at 1194-95.

Following this Court's command in *Wyeth*, the Court of Appeals in *Saleh* extensively considered the purpose underlying the combatant activities exception to the FTCA in determining whether preemption was appropriate. Pet. App. 14-15, 23 (analyzing plain meaning of combatant activities exception and citing case law regarding the federal interest embodied in the combatant activities exception). Moreover, *Saleh*, unlike *Wyeth*, also involves constitutional expressions of federal interest, and the Court of Appeals considered the interests embodied in the relevant constitutional provisions in determining that the Constitution preempted Petitioners' state-law claims. *See* Pet. App. 25-28 (analyzing the federal interest in the unfettered conduct of war as embodied in the United States Constitution).

Wyeth's second premise, based on wariness against infringing traditional state authority, highlights a critical distinction between this case and *Wyeth*. In *Wyeth*, this Court found state tort suits were the traditional remedy for consumers injured by unsafe drugs, 129 S. Ct. at 1199-1200, and that far from displacing that remedy, Congress had been careful to preserve state authority, *id.* at 1195-96, leaving state tort law in place as a "complementary form of drug regulation." *Id.* at 1202.

This case, by contrast, involves the nation's warmaking power—a power never committed to state authority, but instead reserved by our founding document solely to the federal government. The Constitution entrusts the conduct of war exclusively to Congress and the President,[18] and affirmatively divests the states of any corresponding role.[19] Thus, unlike the

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18. *See* U.S. Const. art. I, § 8, cls. 1, 11-16 (granting Congress the powers to provide for the common Defence; declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; raise Armies and a Navy; make Rules governing the land and naval Forces; provide for calling forth the Militia; provide for organizing, arming, and disciplining the Militia, and for governing them when called into national service; and make all Laws necessary and proper to those ends); U.S. Const. art. II, § 2, cl. 1 (designating President as Commander in Chief); *see also Johnson v. Eisentrager*, 339 U.S. 763, 788 (1950); *The Federalist* Nos. 24, 69 (Hamilton).

19. *See* U.S. Const. art. I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation [or] grant Letters of Marque and Reprisal . . . ."); *id.* § 10, cl. 3 ("No State shall, without the consent of Congress . . . keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent danger as will not admit of delay.").

regulation of drugs, regulation of the conduct of war is not "a field which the States have traditionally occupied," and not part of "the historic police powers of the States." *Wyeth*, 129 S. Ct. at 1194-95 (citation omitted); *see also* Pet. App. 23 ("Unlike tort regulation of dangerous or mislabeled products, the Constitution specifically commits the Nation's war powers to the federal government, and as a result, the states have traditionally played no role in warfare."). As a result, there can be no federalism-based presumption against preemption here, and there is no conflict between the D.C. Circuit's decision here and this Court's decision in *Wyeth*.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition.

Respectfully submitted,

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